FILED
MAR 1 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(24)

No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: OCT. 24, 2006
CERTIORARI GRANTED: JAN. 19, 2007

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UNITED STATES DISTRICT COURT
FOR THE EIGHTH CIRCUIT

No. 05-3152

ATLANTIC RESEARCH CORPORATION, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DOCKET ENTRIES

DATE	PROCEEDINGS
08/08/2005	Civil Case Docketed. Dist. Ct. Office: El Dorado, AR
	* * * * *
09/09/2005	RECORDS received: Transcript, consisting of 1 Volume of proceedings held on 5/12/2005. Location STL. [05-3152]
	* * * * *
10/13/2005	BRIEF FILED - Brief of Appellant - Atlantic Research. 12,803 words w/addendum 10 copies - w/service 10/12/05 w/ cdrom. [05-3152] [1963538]
	* * * * *

DATE	PROCEEDINGS
12/06/2005	BRIEF FILED - Brief of Appellee - USA. 13,933 words - 10 copies - w/service 12/5/05 w/CDROM [05-3152] [1982955]
12/06/2005	RECORDS received: Appendix filed by Appellee USA consisting of 1 Volume(s), 4 Copies. [05-3152]
	* * * * *
12/27/2005	BRIEF FILED - Reply brief - Atlantic Research. 5,589 words 10 copies - w/service 12/21/05. w/CD [05-3152] [1990456]
	* * * * *
03/16/2006	ARGUED AND SUBMITTED IN ST. LOUIS, MISSOURI TO JUDGES Roger L. Wollman, Circuit Judge, William J. Riley, Circuit Judge, James M. Rosenbaum, Visiting Judge, District of Minnesota. Thomas Armstrong for Appellant Atlantic Research. Ronald M. Spritzer for Appellee USA. Rebuttal by: Mr. Armstrong. RECORDED. [05-3152]
	* * * * *
08/11/2006	THE COURT: Roger L. Wollman, William J. Riley, James M. Rosenbaum. OPINION FILED by James M. Rosenbaum, Authoring Judge PUBLISHED. [05-3152] [2077355]

DATE	PROCEEDINGS
08/11/2006	JUDGMENT: Roger L. Wollman, William J. Riley, James M. Rosenbaum: The judgment of the lower court is REVERSED in accordance with the opinion. [05-3152] [2077358]

* * * * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

No. 02-CV-01199-HFB

UNITED STATES OF AMERICA, DEFENDANT

v.

ATLANTIC RESEARCH CORPORATION, INC.,
PLAINTIFF

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/12/2002	1	COMPLAINT (2 Summons(es) issued & retd to atty f/svc) (cn) (Entered: 12/13/2002)
	* * * * *	
02/18/2003	6	ANSWER by defendant USA [1-1] (cn) (Entered: 02/18/2003)
	* * * * *	
12/23/2004	24	MOTION by plaintiff Atlantic Research to amend complt (cn) (Entered: 12/23/2004)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
12/23/2004	26	AMENDED COMPLAINT [1-1] by plaintiff Atlantic Research (cn) (Entered: 12/23/2004)
	* * * * *	
01/26/2005	28	MOTION by defendant USA to dismiss f/failure to state a claim (cn) (Entered: 01/26/2005)
01/26/2005	29	MEMORANDUM BRIEF by defendant USA in support of motion to dismiss f/failure to state a claim [28-1] (cn) (Entered: 01/26/2005)
	* * * * *	
02/17/2005	32	RESPONSE/BRIEF/OPPOSITION by plaintiff Atlantic Research to motion to dismiss f/failure to state a claim [28-1] (cn) (Entered: 02/17/2005)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
03/08/2005	35	REPLY MEMORANDUM by defendant USA in support of motion to dismiss f/failure to state a claim [28-1] (mfr) (Entered: 03/08/2005)
	* * * * *	
05/02/2005	37	SUPPLEMENT by defendant USA re motion to dismiss f/failure to state a claim [28-1] (cn) (Entered: 05/02/2005)
05/12/2005	38	CLERK'S NOTES: hearing held 9:00am 5/12/05 on motion to dismiss f/failure to state a claim [28-1] (cn) (Entered: 05/16/2005)
	* * * * *	
06/01/2005	40	MEMORANDUM OPINION: by Honorable Harry F. Barnes (cc: all counsel) (cn) (Entered: 06/01/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
06/01/2005	41	ORDER by Honorable Harry F. Barnes granting motion to dismiss f/failure to state a claim [28-1] dismissing case (cc: all counsel) (cn) (Entered: 06/01/2005)
07/28/2005	42	NOTICE OF APPEAL by plaintiff Atlantic Research from District Court decision re: order [41-2] dated 6/1/05 (cc: opposing counsel) (cn) (Entered: 07/29/2005)
		* * * * *
09/07/2005		TRANSCRIPT of Proceedings held on May 12, 2005 before Judge Harry F. Barnes. Court Reporter: Donna McKinney. (cnn) (TEXT ENTRY ONLY NO DOCUMENT ATTACHED) (Entered: 09/07/2005)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

No. 02-1199

ATLANTIC RESEARCH CORPORATION, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 12, 2002]

COMPLAINT

Plaintiff, Atlantic Research Corporation, by its undersigned Counsel, alleges the following against Defendant, the United States of America.

NATURE OF THE ACTION

1. Plaintiff brings this action under Sections 107(a) and 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 *et seq.* ("CERCLA").

2. Plaintiff seeks to recover from the Defendant necessary costs of response Plaintiff has incurred consistent with the National Contingency Plan, 40 C.F.R. Part 300, caused by the release or threatened release of hazardous substances at a facility in Camden, Arkansas. Plaintiff also seeks a declaratory judgment on liability for response costs pursuant to 28 U.S.C. §§ 2201 and 2202 and CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), declaring Plaintiff's right to recover past and future response costs

for the release of hazardous substances at and/or from its Camden facility.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and under 28 U.S.C. § 1331. In addition, the Declaratory Judgment Act, 28 U.S.C. § 2201, and Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), authorize this Court to grant Plaintiff declaratory relief.

4. Venue in this Court is proper pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), because the releases or threatened releases alleged herein occurred within the Western District of Arkansas.

PARTIES

5. Plaintiff, Atlantic Research Corporation("ARC"), is a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business at 5945 Wellington Road, Gainesville, Virginia 20155. ARC is a wholly owned subsidiary of Chromalloy Gas Turbine Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principle place of business at 200 Park Avenue, New York, New York, 10166. Chromalloy Gas Turbine Corporation is a wholly-owned subsidiary of Chromalloy American Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principle place of business at 200 Park Avenue, New York, New York, 10166, which in turn is a wholly-owned subsidiary of Sequa Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business at 200 Park Avenue, New York, New

York 10166. Plaintiff is a "person" as the term is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

6. The United States of America ("United States" or "Government") has been named as a defendant on the basis of actions undertaken by its departments, agencies, and instrumentalities, including the following: the United States Department of Defense ("DOD"), the United States Department of the Army, and the United States Army Missile Command.

BACKGROUND

7. ARC has leased property in the Highland Industrial Park in Camden, Arkansas since approximately 1979 ("Camden Site").

8. The Highland Industrial Park, currently owned by Highland Industrial Park, Inc., was originally part of the Shumaker Naval Ammunition Depot, a DOD facility.

9. At the Camden Site, ARC has operated both as a prime contractor to DOD and as a subcontractor for other companies who have contracted directly with the United States.

10. One of the first prime contracts secured by ARC to be performed at the Camden Site involved the Chaparral rocket motor program.

11. The United States had previously contracted with a third-party for the production of Chaparral rockets, which utilized a propellant containing ammonium perchlorate ("AP"). Notwithstanding that thousands of these rockets had been produced and delivered in conformance with the contract terms, the United States determined that it could not deploy them in the field because of the contrails produced by the AP propellant.

12. As a consequence, the United States developed (through a government contract) a new "smokeless" rocket that used a double-based propellant that did not contain AP.

13. The Army then issued a Request for Proposal for the retrofitting of the existing Chaparral rocket motors. ARC responded to the RFP and was awarded Contract No. DAAH01-81-C-B047 ("Contract").

14. The Contract was executed and effective July 31, 1981 and ran until 1986. The Contract called for ARC to retrofit approximately 3,245 rocket motors by removing AP-based propellant and replacing it with the new double-based propellant.

15. Upon information and belief, ARC ultimately retrofitted approximately 4,500 to 5,000 rocket motors pursuant to the Contract.

16. Under the Contract, the United States arranged for the delivery of the Government-owned unfired rocket motors containing AP-based propellant to the Camden Site.

17. The Government-owned unfired rocket motors were delivered to the Camden Site as Government Furnished Equipment.

18. Under the Contract, ARC was tasked with removing the AP-based propellant from the rocket motors so that they could be refilled with the non-AP propellant.

19. To remove the AP-based propellant, ARC constructed Building 52 where it installed and used washout equipment (principally a high pressure water spray system). Building 52 was constructed and the washout equipment was developed, installed, and used specifically for the Chaparral Contract.

20. Using the high pressure water spray system, ARC removed the AP-based propellant from the rocket motors.

21. The high pressure water caused pieces of propellant to break off the motor. These pieces were captured by a filter, while propellant-contaminated wastewater drained through the filter into a catch basin.

22. Propellant-contaminated wastewater also splashed out of the front end of the rocket motor. Some of this propellant-contaminated wastewater that splashed out the front end fell onto the concrete, where it was channeled into drains that led to an underground sump, which was emptied several times per week.

23. The remainder of this propellant-contaminated wastewater that splashed out the front end of the rocket motor was released to the environment by flowing and spraying directly onto the gravel outside Building 52.

24. The release of the propellant contaminated wastewater from the rocket motors and Building 52 contaminated soil and groundwater.

25. The pieces of propellant captured on the filter, as well as the propellant-contaminated wastewater captured in the catch basin and sump, were collected and transported to an on-site open burning unit ("OBU"), where they periodically were burned.

26. This burning process was authorized by a permit issued by the Arkansas Department of Pollution Control and Ecology (later referred to as the Arkansas Department of Environmental Quality).

27. This burning process was operated in a manner that was consistent with the permit requirements.

28. Some portion of the solid propellant pieces and propellant-contaminated wastewater was released to the environment from the OBU.

29. The release of the propellant pieces and propellant-contaminated wastewater from the OBU contaminated soil and groundwater.

30. Propellant contamination has been detected in soil and groundwater at and under Building 52 and the OBU.

EXTENT OF GOVERNMENT INVOLVEMENT

31. The Government intended that propellant waste would be generated pursuant to the terms of the Contract.

32. The Government knew that propellant waste would be generated pursuant to ARC's work under the Contract.

33. The Government intended that propellant waste would be disposed at the Camden Site pursuant to the terms of the Contract.

34. The Government had actual knowledge of the fact and manner of the disposal of the propellant waste.

35. The Government had constructive knowledge of the fact and manner of the disposal of the propellant waste.

36. The Contract incorporated the specifications for the washout procedures at Building 52 and the treatment and disposal procedures utilized at the OBU.

37. The Government approved the specifications for the washout procedures at Building 52 and the treatment and disposal procedures to be utilized at the OBU.

38. The Government knew that the propellant removed from the motors during the high pressure water spray operation would be collected by filters and collection tanks.

39. The Government knew that the propellant removed from the motors during the high pressure water spray operation would be transferred from the filters and collection tanks to an OBU.

40. DOD personnel, including Defense Contract Administration Services ("DCAS") representatives, were present at the Camden Site several times a week.

41. DOD personnel, including DCAS representatives, personally observed ARC's performance under the Contract.

42. DOD personnel, including DCAS representatives, personally observed ARC's waste handling procedures, including operations at Building 52 and the OBU, with regard to the propellant removed from the rocket motors pursuant to the Contract.

43. The Government furnished and retained title to the rocket motors provided to ARC at the Camden Site under the Chaparral program.

44. The Government owned the work in progress being performed under the Contract.

45. The Government owned the completed refurbished rocket motors under the Contract.

46. The Government owned the propellant removed from the rocket motors and released to the environment.

47. The work performed by ARC pursuant to the Contract was performed for the Government's benefit.

48. The work performed by ARC pursuant to the Contract was performed at the Government's direction.

49. The Government controlled the quantities of propellant waste generated via the Government's control over the quantity of propellant contained in each rocket and the number of rockets sent to ARC for propellant removal and disposal.

50. The Government controlled the quantities of propellant waste disposed via the Government's control over the quantity of propellant contained in each rocket and the number of rockets sent to ARC for propellant removal and disposal.

51. The Government selected the Camden Site as the location at which disposal of the waste propellant would occur.

52. The Government exercised pervasive control over the rocket and missile systems industry.

53. The Government exercised pervasive control over AP production and use in the United States.

54. The Government supplied, as Government Furnished Property ("GFP"), certain components of the new, double-based propellant ARC loaded into the rocket motors after removal of the AP-based propellant. This GFP included, at a minimum, HMX and, upon information and belief, RDX.

55. The vast majority of AP disposed at the Site is attributable to ARC's work performed for the Government.

CERCLA CONTRIBUTION

56. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in Paragraphs 1 through 55 of this Complaint.

57. ARC's Camden Site is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

58. Building 52 is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

59. The OBU is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

60. Each of the rocket motors provided to ARC for refurbishment under the Contract is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

61. The United States is a "person" as that term is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

62. The propellant removed from the rocket motors and disposed at the Camden Site is a "hazardous sub-

stance" within the meaning of CERCLA § 101(14), 42 U.S.C. § 9601(14).

63. The propellant removed from the rocket motors and disposed at the Camden Site is a "hazardous waste" pursuant to the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*

64. The presence of propellant constituents in the soil and groundwater at the Camden Site constitutes a "release" or "threatened release" of "hazardous substances" within the meaning of CERCLA §§ 101(14) and (22), 42 U.S.C. §§ 9601(14) and (22).

65. ARC has undertaken, and will continue to undertake, investigations and response actions in connection with the Camden facility in response to releases or threatened releases of hazardous substances, and has incurred and is expecting to incur necessary costs of response consistent with the National Contingency Plan.

66. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States "owned" the rocket motors at the time hazardous substances were disposed from the motors.

67. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States was an "operator" of the Camden Site at the time hazardous substances were disposed at the Camden Site.

68. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States was an "operator" of the rocket motors at the time hazardous substances were disposed from the motors.

69. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who by contract "arranged" for the disposal or treatment of hazardous substances owned by it at the Camden Site.

70. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who "arranged" with a transporter for transport for disposal or treatment of hazardous substances owned by the United States at the Camden Site.

71. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who "arranged" for the refurbishment of its rocket motors knowing that the generation and disposal of wastes containing hazardous substances was inherent in the refurbishment process.

72. The United States is liable to ARC for contribution under CERCLA § 113(f), 42 U.S.C. § 9613(f), because the United States is a "person who is liable or potentially liable" under CERCLA § 107(a), 42 U.S.C. § 9607(a).

73. Pursuant to CERCLA § 113(f), 42 U.S.C. § 9613(f), ARC is entitled to contribution from the United States in connection with the Camden Site for the United States' equitable share of the response costs incurred by ARC. The Court should allocate the costs between the United States and ARC using such equitable factors as the Court determines are appropriate.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff ARC demands judgment in its favor and against the Defendant United States as follows:

1) Declaring Defendant strictly liable for necessary response costs, consistent with the National Contingency Plan, relating to the Camden Site, such judgment to be binding on any subsequent action or actions to recover further response costs or damages;

2) Declaring Defendant liable to Plaintiff pursuant to CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), for contribution for the necessary costs of response, incurred or to be incurred by Plaintiff in connection with the Camden Site;

3) Ordering Defendant to pay its share of contribution for necessary response costs, consistent with the National Contingency Plan, thus far incurred by Plaintiff in connection with the Camden Site;

4) Declaring Defendant liable for its share of contribution for necessary response costs, consistent with the National Contingency Plan, incurred in the future by Plaintiff in connection with the Camden Site;

5) Awarding Plaintiff interest and costs of suit, including reasonable attorneys' fees; and

6) Awarding Plaintiff such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ ROBERT A. MATTHEWS
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Research Corporation

Date: December 12, 2002

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

C.A. No. 02-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 23, 2004]

AMENDED COMPLAINT

Plaintiff, Atlantic Research Corporation, by its undesigned Counsel, alleges the following against Defendant, the United States of America.

NATURE OF THE ACTION

1. Plaintiff brings this action under Sections 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 *et seq.* ("CERCLA").

2. Plaintiff seeks to recover from the Defendant necessary costs of response Plaintiff has incurred consistent with the National Contingency Plan, 40 C.F.R. Part 300, caused by the release or threatened release of hazardous substances at a facility in Camden, Arkansas. Plaintiff also seeks a declaratory judgment on liability for response costs pursuant to 28 U.S.C. §§ 2201 and 2202 and CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), declaring Plaintiff's right to recover past response costs

for the release of hazardous substances at and/or from its Camden facility.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and under 28 U.S.C. § 1331. In addition, the Declaratory Judgment Act, 28 U.S.C. § 2201, and Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), authorize this Court to grant Plaintiff declaratory relief.

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PARTIES

5. Plaintiff, Atlantic Research Corporation ("ARC"), is a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business at 5945 Wellington Road, Gainesville, Virginia 20155. ARC is a wholly owned subsidiary of Chromalloy Gas Turbine Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principle place of business at 200 Park Avenue, New York, New York 10166. Chromalloy Gas Turbine Corporation is a wholly-owned subsidiary of Chromalloy American Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principle place of business at 200 Park Avenue, New York, New York, 10166, which in turn is a wholly-owned subsidiary of Sequa Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business at 200 Park Avenue, New York, New York 10166. Plaintiff is a "person" as the term

is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

6. The United States of America ("United States" or "Government") has been named as a defendant on the basis of actions undertaken by its departments, agencies, and instrumentalities, including the following: the United States Department of Defense ("DOD"), the United States Department of Army, and the United States Army Missile Command.

BACKGROUND

7. At all times relevant to this Complaint, ARC leased property in the Highland Industrial Park in Camden, Arkansas beginning in approximately 1979 and lasting until October 2003 ("Camden Site").

8. The Highland Industrial Park, currently owned by Highland Industrial Park, Inc., was originally part of the Shumaker Naval Ammunition Depot, a DOD facility.

9. At the Camden Site, ARC operated both as a prime contractor to DOD and as a subcontractor for other companies who have contracted directly with the United States.

10. One of the first prime contracts secured by ARC to be performed at the Camden Site involved the Chaparral rocket motor program.

11. The United States had previously contracted with a third-party for the production of Chaparral rockets, which utilized a propellant containing ammonium perchlorate ("AP"). Notwithstanding that thousands of these rockets had been produced and delivered in conformance with the contract terms, the United States determined that it could not deploy them in the field because of the contrails produced by the AP propellant.

12. As a consequence, the United States developed (through a government contract) a new "smokeless" rocket that used a double-based propellant that did not contain AP.

13. The Army then issued a Request for Proposal for the retrofitting of the existing Chaparral rocket motors. ARC responded to the RFP and was awarded Contract No. DAAH01-81-C-B047 ("Contract").

14. The Contract was executed and effective July 31, 1981 and ran until 1986. The Contract called for ARC to retrofit approximately 3,245 rocket motors by removing AP-based propellant and replacing it with the new double-based propellant.

15. Upon information and belief, ARC ultimately retrofitted approximately 4,500 to 5,000 rocket motors pursuant to the Contract.

16. Under the Contract, the United States arranged for the delivery of the Government-owned unfired rocket motors containing AP-based propellant to the Camden Site.

17. The Government-owned unfired rocket motors were delivered to the Camden Site as Government Furnished Equipment.

18. Under the Contract, ARC was tasked with removing the AP-based propellant from the rocket motors so that they could be refilled with the non-AP propellant.

19. To remove the AP-based propellant, ARC constructed Building 52 where it installed and used washout equipment (principally a high pressure water spray system). Building 52 was constructed and the washout equip-

ment was developed, installed, and used specifically for the Chaparral Contract.

20. Using the high pressure water spray system, ARC removed the AP-based propellant from the rocket motors.

21. The high pressure water caused pieces of propellant to break off the motor. These pieces were captured by a filter, while propellant-contaminated wastewater drained through the filter into a catch basin.

22. Propellant-contaminated wastewater also splashed out of the front end of the rocket motor. Some of this propellant-contaminated wastewater that splashed out the front end fell onto the concrete, where it was channeled into drains that led to an underground sump, which was emptied several times per week.

23. The remainder of this propellant-contaminated wastewater that splashed out the front end of the rocket motor was released to the environment by flowing and spraying directly onto the gravel outside Building 52.

24. The release of the propellant-contaminated wastewater from the rocket motors and Building 52 contaminated soil and groundwater.

25. The pieces of propellant captured on the filter, as well as the propellant-contaminated wastewater captured in the catch basin and sump, were collected and transported to an on-site open building unit ("OBU"), where they periodically were burned.

26. This burning process was authorized by a permit issued by the Arkansas Department of Pollution Control and Ecology (later referred to as the Arkansas Department of Environmental Quality).

27. This burning process was operated in a manner that was consistent with the permit requirements.

28. Some portion of the solid propellant pieces and propellant-contaminated wastewater was released to the environment from the OBU.

29. The release of the propellant pieces and propellant-contaminated wastewater from the OBU contaminated soil and groundwater.

30. Propellant contamination has been detected in soil and groundwater at and under Building 52 and the OBU.

EXTENT OF GOVERNMENT INVOLVEMENT

31. The Government intended that propellant waste would be generated pursuant to the terms of the Contract.

32. The Government knew that propellant waste would be generated pursuant to ARC's work under the Contract.

33. The Government intended that propellant waste would be disposed at the Camden Site pursuant to the terms of the Contract.

34. The Government had actual knowledge of the fact and manner of the disposal of the propellant waste.

35. The Government had constructive knowledge of the fact and manner of the disposal of the propellant waste.

36. The Contract incorporated the specifications for the washout procedures at Building 52 and the treatment and disposal procedures utilized at the OBU.

37. The Government approved the specifications for the washout procedures at Building 52 and the treatment and disposal procedures to be utilized at the OBU.

38. The Government knew that the propellant removed from the motors during the high pressure water spray operation would be collected by filters and collection tanks.

39. The Government knew that the propellant removed from the motors during the high pressure water spray operation would be transferred from the filters and collection tanks to an OBU.

40. DOD personnel, including Defense Contract Administration Services ("DCAS") representatives, were present at the Camden Site several times a week.

41. DOD personnel, including DCAS representatives, personally observed ARC's performance under the Contract.

42. DOD personnel, including DCAS representatives, personally observed ARC's waste handling procedures, including operations at Building 52 and the OBU, with regard to the propellant removed from the rocket motors pursuant to the Contract.

43. The Government furnished and retained title to the rocket motors provided to ARC at the Camden Site under the Chaparral program.

44. The Government owned the work in progress being performed under the Contract.

45. The Government owned the completed refurbished rocket motors under the Contract.

46. The Government owned the propellant removed from the rocket motors and released to the environment.

47. The work performed by ARC pursuant to the Contract was performed for the Government's benefit.

48. The work performed by ARC pursuant to the Contract was performed at the Government's direction.

49. The Government controlled the quantities of propellant waste generated via the Government's control over the quantity of propellant contained in each rocket and the number of rockets sent to ARC for propellant removal and disposal.

50. The Government controlled the quantities of propellant waste disposed via the Government's control over the quantity of propellant contained in each rocket and the number of rockets sent to ARC for propellant removal and disposal.

51. The Government selected the Camden Site as the location at which disposal of the waste propellant would occur.

52. The Government exercised pervasive control over the rocket and missile systems industry.

53. The Government exercised pervasive control over AP production and use in the United States.

54. The Government supplied, as Government Furnished Property ("GFP"), certain components of the new, double-based propellant ARC loaded into the rocket motors after removal of the AP-based propellant. This GFP included, at a minimum, HMX and, upon information and belief, RDX.

55. The vast majority of AP disposed at the Site is attributable to ARC's work performed for the Government.

COUNT I: OWNER LIABILITY

56. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in Paragraph 1 through 55 of this Amended Complaint.

57. The Camden Site is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

58. Building 52 is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

59. The OBU is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

60. Each of the rocket motors provided to ARC for refurbishment under the Contract is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).

61. The United States is a "person" as that term is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

62. The propellant removed from the rocket motors and disposed at the Camden Site is a "hazardous substance" within the meaning of CERCLA § 101(14), 42 U.S.C. § 9601(14).

63. The propellant removed from the rocket motors and disposed at the Camden Site is a "hazardous waste" pursuant to the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*

64. The presence of propellant constituents in the soil and groundwater at the Camden Site constitutes a "release" or "threatened release" of "hazardous substances" within the meaning of CERCLA §§ 101(14) and (22), 42 U.S.C. §§ 9601(14) and (22).

65. ARC has undertaken investigations and response actions in connection with the Camden facility in response to releases or threatened releases of hazardous substances, and has incurred necessary costs of response consistent with the National Contingency Plan.

66. Under CERCLA § 107(a), 42 U.S.C. § 9607(a), persons who owned a facility at the time of disposal of hazardous substances are liable for necessary costs of responding to a release or threatened release of hazardous substances incurred by any person consistent with the NCP.

67. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States "owned" the rocket motors at the time hazardous substances were disposed from the motors.

COUNT II: OPERATOR LIABILITY

68. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in Paragraph 1 through 67 of this Amended Complaint.

69. Under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), persons who operated a facility at the time of disposal of hazardous substances are liable for necessary costs of responding to a release or threatened release of hazardous substances incurred by any person consistent with the NCP.

70. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States was an "operator" of the Camden Site at the time hazardous substances were disposed at the Camden Site.

71. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States was an "operator" of the rocket motors at the time hazardous substances were disposed from the motors.

COUNT III: ARRANGER LIABILITY

72. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in Paragraphs 1 through 71 of this Amended Complaint.

73. Under CERCLA § 107(a), 42 U.S.C. § 9607(a), persons who arranged for disposal of hazardous substances at a facility are liable for necessary costs of responding to a release or threatened release of hazardous substances incurred by any person consistent with the NCP.

74. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who by contract "arranged" for the disposal or treatment of hazardous substances owned by it at the Camden Site.

75. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who "arranged" with a transporter for transport for disposal or treatment of hazardous substances owned by the United States at the Camden Site.

76. The United States is liable for response costs at the Camden Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who "arranged" for the refurbishment of its rocket motors knowing that the generation and disposal of wastes con-

taining hazardous substances was inherent in the refurbishment process.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff ARC demands judgment in its favor and against the Defendant United States as follows:

1) Declaring Defendant strictly liable for necessary response costs, consistent with the National Contingency Plan, relating to the Camden Site;

2) Declaring Defendant liable as a former owner, a former operator, and an arranger to Plaintiff pursuant to CERCLA § 107(a), 42 U.S.C. § 9607(a), for the necessary costs of response incurred by Plaintiff in connection with the Camden Site;

3) Awarding Plaintiff response costs incurred to date by Plaintiff, under CERCLA § 107(a) and/or federal common law, such amount to be determined at trial;

4) Awarding Plaintiff interest and costs of suit, including reasonable attorneys' fees; and

5) Awarding Plaintiff such other relief as the Court may deem just and proper.

Respectfully submitted,

COMPTON, PREWETT, THOMAS AND HICKEY, P.A.
423 N. Washington Ave.
El Dorado, Ark. 71730-0032
(870) 862-3478

By: /s/ FLOYD M. THOMAS, JR.
FLOYD M. THOMAS JR.
Attorney for Atlantic Research Corp.

CERTIFICATE OF SERVICE

I, Floyd M. Thomas, Jr. hereby certify that on December ____, 2004, the foregoing Motion for Leave to File Amended Complaint was served by first class mail, postage prepaid, on the following:

THOMAS L. SANSONETTI
Assistant Attorney General
Environmental & Natural Resources Division
MICHELLE L. WALTER
Environmental Defense Section
United States Department of Justice
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Washington, D.C. 20026-3986

TOM GEAN
United States Attorney
LARRY McCORD
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LTC MICHEL GRAHAM
Environmental Law Division
United States Army
901 N. Stuart St., Suite 400
Arlington, VA 20003

/s/ FLOYD M. THOMAS, JR.
FLOYD M. THOMAS, JR.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

C.A. No. 02-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 23, 2004]

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiff Atlantic Research Corporation ("Plaintiff") seeks leave of this Court to file a First Amended Complaint, as provided for in Fed. R. Civ. Proc. 15. A copy of the proposed First Amended Complaint is attached to this Motion.

The filing of an amended complaint in this matter was necessitated by the decision issued by the Supreme Court on December 13, 2004 in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 534 U.S. ____,____S. Ct.___, No. 02-1192, WL 2847713 (U.S. Dec. 13, 2004) ("*Aviall*") [a copy of which is attached to this Motion]. Under *Aviall*, the Supreme Court held that under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.* ("CERCLA"), a private party who has not been sued under CERCLA Section 106 or 107 may not bring an action in contribution against other par-

ties under CERCLA Section 113(f)(1). The Supreme Court affirmatively declined, however, to resolve whether a similarly situated private party may seek to recover costs it has incurred under CERCLA Section 107(a). As a consequence, private party cost recovery claims under CERCLA Section 107(a) remain viable.

Plaintiff's original Complaint in the matter before this Court invokes both Sections 107(a) and 113(f)(1) as the bases for its claims for recovery of environmental remediation costs from defendant United States of America ("United States" or "Defendant"). Under *Aviall*, the Section 113(f)(1) claim may no longer be maintained. Plaintiff now seeks to file the First Amended Complaint in order to establish CERCLA § 107(a) as the basis for Plaintiff's claim for recovery of environmental remediation costs it has incurred.

The proposed First Amended Complaint clarifies two other points. First, since the filing of the original Complaint, Plaintiff has been acquired; as a result, and as reflected in the First Amended Complaint, Plaintiff no longer leases the contaminated property in question. Second, as a consequence of the first point, through the First Amended Complaint Plaintiff seeks recovery only of Environmental remediation costs Plaintiff has incurred in the past.

Plaintiff has consulted with counsel for the United States, and is informed the United States has no objection to the filing of the First Amended Complaint so long as Plaintiff supports the request of the United States for an extension of the time for the Defendant to Answer the First Amended Complaint. Plaintiff does support the request of the United States, and would direct the Court's

attention to the recent Joint Notice filed by the parties, which also addresses this issue.

Respectfully submitted,

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423 North Washington
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(870) 862-3478

BY: /s/ FLOYD M. THOMAS, JR.
FLOYD M. THOMAS, JR. #74-145
Attorney for Plaintiff Atlantic Research Corporation

CERTIFICATE OF SERVICE

I, Floyd M. Thomas, Jr. hereby certify that on December 23 2004, the foregoing Motion for Leave to File Amended Complaint was served by first class mail, postage prepaid, on the following:

THOMAS L. SANSONETTI
Assistant Attorney General
Environmental & Natural Resources Division
MICHELLE L. WALTER
Environmental Defense Section
United States Department of Justice
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TOM GEAN
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/s/ FLOYD M. THOMAS, JR.
FLOYD M. THOMAS, JR.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

Case No. 02-CV-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Jan. 26, 2005]

DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendant, the United States of American ("United States") moves to dismiss Plaintiff's Amended Complaint, filed December 23, 2004, under Fed. R. Civ. P. 12 (b)(6) for failure to state a claim upon which relief can be granted. Pursuant to LR7.2(a), the arguments supporting this motion are contained in the accompanying Defendant's Memorandum in Support of Motion to Dismiss for Failure to State a Claim.

Respectfully submitted,

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Environment and Natural Resources Division

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Counsel for the United States of America

OF COUNSEL FOR THE UNITED STATES:

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U.S. Army Legal Services Agency
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(703) 696-1596

DATED: January 24, 2005

CERTIFICATE OF SERVICE

I, Larry R. McCord, Assistant U.S. Attorney for the Western District of Arkansas, hereby certify that a true and correct copy of the foregoing pleading was mailed this 24 day of January, 2005 to:

ROBERT A. MATTHEWS
SCOTT E. KAUFF
McKenna Long & Aldridge LLP
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Washington, DC 20006

FLOYD M. THOMAS JR.
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423 N. Washington Ave.
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/s/ LARRY R. McCORD
LARRY R. MCCORD
Assistant United States
Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

Case No. 02-CV-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Jan. 26, 2005]

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

INTRODUCTION

Plaintiff Atlantic Research Corporation ("ARC") originally brought this lawsuit against the United States of America under the Comprehensive Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, seeking to recover the costs that ARC allegedly has incurred in cleaning up certain environmental contamination at a facility in Camden, Arkansas. *See* Complaint ¶¶ 1, 2, filed December 12, 2002. ARC based its complaint on CERCLA Sections 107(a) (the cost recovery provision) and 113(f) (the contribution provision), 42 U.S.C. §§ 9607(a), 9613(f).

Recently, the parties informed the Court of the Supreme Court's decision in *Cooper Indus., Inc. v. Aviall*

Servs., Inc., 125 S. Ct. 577 (2004) ("*Aviall*"), *see* Joint Notice of Supreme Court Decision, filed December 21, 2004 ("Joint Notice"), in which the Supreme Court held that a party may not bring a contribution claim under Section 113(f)(1) in the absence of a preexisting civil action against that party to undertake or pay for the cleanup. After the *Aviall* decision, ARC sought to amend its complaint to drop its Section 113(f) claim (because there is and has been no such civil action against ARC to undertake or pay for the cleanup) and to clarify that CERCLA Section 107(a) is the sole basis for ARC's claim to recoup the costs it has incurred in cleaning up the contaminated property. *See* Motion for Leave to File Amended Complaint, filed December 23, 2004. On December 23, 2004, the Court granted ARC's motion to amend its complaint. *See* Order Permitting Filing of Amended Complaint, entered December 23, 2004.

ARC's amended complaint does not save ARC's lawsuit. Plaintiff's amendment is directly contrary to Eighth Circuit precedent, as well as the holdings of nine other courts of appeals, that Section 107(a) does not provide an independent statutory basis for ARC either to recover all of its costs under a cost recovery claim, or to recover some portion of its costs under a contribution claim. Thus, the Court should dismiss ARC's amended complaint for failure to state a claim upon which relief can be granted.

BACKGROUND

I. CERCLA BACKGROUND

Congress enacted CERCLA (also generally known as "Superfund") in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA, as amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-99, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). It "both provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted).

CERCLA provides the President (acting primarily through the United States Environmental Protection Agency ("EPA")) with alternative means for cleaning up contaminated property. EPA itself can undertake response actions to address hazardous substances, *see* 42 U.S.C. § 9604, or EPA can compel responsible parties (through an administrative order or a request for judicial relief) to undertake response actions, which EPA then monitors, *see id.* § 9606. Under either approach, the United States may recover the costs associated with the response action ("response costs") through a cost recovery action under Section 107(a), *id.* § 9607(a).

CERCLA Section 107(a)(4)(A) authorizes the United States, as well as other entities and persons, to seek re-

covery of appropriate response costs through a "cost recovery" suit against four categories of "covered persons," referred to as "potentially responsible parties" or "PRPs." These four categories of PRPs are:

(1) owners and operators of facilities at which hazardous substances are located;

(2) past owners and operators of such facilities at the time hazardous substances were disposed of;

(3) persons who arranged for disposal or treatment of hazardous substances; and

(4) certain transporters of hazardous substances to the site.

Id. § 9607(a)(1)-(4).[1]

A PRP can escape liability for response costs only if it can establish that it qualifies for one of the enumerated defenses in Section 107(b), or some other narrowly defined exclusion from liability.[2] *Id.* § 9607(b). Section 107(b) specifies the defenses to liability and provides that a PRP will not be liable if it can establish that the release of hazardous substances

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[1] Congress has broadly defined the pertinent statutory terms used in section 107—including "facility," "hazardous substance," "owner or operator," "person," "release," "transport," and "disposal"—to reach a wide range of entities and activities. *See id.* § 9601(9), (14), (20)-(22), (26), (29).

[2] See, e.g., 42 U.S.C. §§ 9607(n) (liabilities of fiduciaries and certain exclusions), 9607(q) (contiguous properties), 9607(r) (bona fide prospective purchasers).

> [was] caused solely by—(1) an act of God; (2) an act of war; (3) an act or omission of a third party, other . . . than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes . . . that (a) he exercised due care with respect to the hazardous substance concerned . . . and (b) he took precautions against foreseeable acts or omissions of any such third party . . . .

Id.

Assuming that a PRP cannot avail itself of one of the enumerated defenses or exclusions to liability, Section 107(a) specifically provides that the United States, individual States, and Indian tribes are entitled to recover from PRPs "all costs of removal or remedial action incurred" that are "not inconsistent with the national contingency plan."[3] *Id.* § 9607(a)(4)(A). In addition, Section 107 provides that PRPs "shall be liable for [] any other necessary costs of response incurred by any other person consistent with the national contingency plan." *Id.* § 9607(a)(4)(B). Several courts of appeals have concluded that persons who are not themselves liable and, thus, not a PRP, may clean up contaminated property and then invoke this provision to seek reimbursement, *i.e.*, cost recovery, from the same four categories of

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[3] "The national contingency plan specifies procedures for preparing and responding to contaminations and was promulgated by the [EPA] pursuant to CERCLA § 105, 42 U.S.C. § 9605 (2000 ed. and Supp. I). The plan is codified at 40 C.F.R. pt. 300 (2004)." *Aviall*, 125 S. Ct. at 580, n.2.

PRPs that are subject to government cleanup actions.[4] Further, ten courts of appeals, including the Eighth Circuit, have uniformly concluded that a person who falls within one of those four categories and, thus, is itself a PRP, cannot rely on Section 107(a) to seek *full cost recovery* on a theory of joint and several liability from another jointly liable party; rather, a party that is itself a PRP is limited to seeking *contribution* from other jointly liable parties in pursuant to Section 113(f).[5]

Congress enacted Section 113(f) in 1986 as part of the SARA amendments to address specifically when a PRP may seek contribution from other PRPs. *See* 42 U.S.C. § 9613(f)(1). Section 113(f)(1) provides in pertinent part that "[a]ny person may seek contribution from

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[4] *See In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1242-43 (7th Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

[5] *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir. 1998); *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 530-531 (8th Cir. 2003); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121-1123 (3d Cir. 1997) ("*Halliburton*"); *Redwing Carriers*, 94 F.3d at 1496; *United States v. Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Techs. Corp.*, 33 F.3d at 103; *Akzo*, 30 F.3d at 764. In addition, the Fifth Circuit, although it does not appear to have directly addressed this issue, also has recognized that "[w]hen one liable party sues another to recover its equitable share of the response costs, the action is one for contribution, which is specifically recognized under CERCLA." *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989).

any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]." *Id.*[6]

As explained above, the Supreme Court determined in *Aviall* that party may not bring a contribution claim under Section 113(f)(1) in the absence of a preexisting civil action against that party to undertake or pay for the cleanup. 125 S. Ct. at 580; see *supra* at 1. The central issue in this case is whether ARC—who, after *Aviall*, cannot sue for contribution under 113(f)(1)—instead can rely solely on CERCLA section 107(a) to bring either a cost recovery or contribution action against the United States when ARC is itself a PRP who does not qualify for one of the enumerated defenses in section 107(b) or for any other exclusion to liability.

II. FACTUAL BACKGROUND

From approximately 1979 until October 2003, ARC leased property in the Highland Industrial Park in Camden, Arkansas ("Camden Site" or "the Site"). From July

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[6] In addition, CERCLA Section 113(f)(3)(B) provides an express right of contribution for:

> [a] person who has resolved its liability to the United States for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in [Section 113(f)(2)].

42 U.S.C. § 9613(f)(3)(B). The Supreme Court in *Aviall* explained the difference between Sections 113(f)(1) and (f)(3)(B), stating that under section 113(f)(1) "contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action." 125 S. Ct. at 583. Section 113(f)(3)(B), however, "permits contribution actions after settlement . . . ." *Id.*

31, 1981 until 1986, ARC (under contract with the United States) retrofitted over 3,200 rocket motors by removing propellant that contained ammonium perchlorate ("AP") and substituting a different propellant in the motor. *See* Amended Complaint *Id.* ¶¶ 7, 14, entered December 23, 2004 ("Am. Compl."). To accomplish this retrofitting, ARC decided to construct a building at the Camden Site known as Building 52 in which ARC installed and used a high pressure water spray system to remove the AP-based propellant from the rocket motors. *Id.* ¶¶ 19, 20. Through this process, wastewater contaminated with the AP-based propellant was released into the environment, thereby contaminating soil and groundwater at the Camden Site. *Id.* ¶¶ 21-24, 30. In addition, ARC received a permit from the State of Arkansas to burn pieces of the AP-based propellant and the AP-contaminated wastewater in an open burning unit at the Camden Site. *Id.* ¶¶ 25-26. Portions of the AP-based propellant pieces and the contaminated wastewater were released into the environment from the open burning unit, further contaminating soil and groundwater at the Site. *Id.* ¶¶ 28-29, 30. ARC subsequently performed "investigations and response actions" at the Camden Site to address this contamination and alleges to have incurred response costs related to those actions. *Id.* ¶ 65.

ARC originally filed this lawsuit on December 12, 2002, under CERCLA sections 107(a) and 113(f), 42 U.S.C. §§ 9607(a), 9613(f), seeking to recover the response costs that it allegedly has incurred at the Camden Site. *See* Complaint ¶¶ 1, 2, 7, filed December 12, 2002. For over two years, the parties engaged in settlement negotiations to resolve the United States' fair share of alleged liability for these costs. *See* Joint Mo-

tion for Stay of Proceedings, filed December 9, 2003; Joint Status Report, Motion to Govern, and Request for Telephonic Status Hearing, filed November 17, 2004 ("November 2004 Status Report"). Toward the end of 2004 these negotiations ended when the Supreme Court issued its decision in *Aviall*. 125 S. Ct. 577. In *Aviall*, the Supreme Court conclusively determined that a party who is liable under CERCLA (a PRP), but who has not been sued under CERCLA to undertake or pay for the cost of cleanup, cannot seek contribution under CERCLA section 113(f)(1), 42 U.S.C. § 9613(f)(1). *Aviall*, 125 S. Ct. at 580.

After the *Aviall* decision, ARC, as a matter of law, has no claim against the United States under Section 113(f) because: (1) ARC has not been sued under CERCLA to undertake or pay for the cost of cleanup and therefore a suit under Section 113(f)(1) is not authorized, and (2) ARC has not resolved its liability to the United States or a State for any of ARC's alleged response costs and therefore a suit under Section 113(f)(3)(B) also is not authorized. *See* Joint Notice at 2. ARC accordingly sought to amend its complaint, among other reasons, to drop its section 113(f) claim in light of *Aviall* and plead a section 107(a) claim as the sole basis for recovery. *See* Motion for Leave to File Amended Complaint, filed December 23, 2004. On December 23, 2004, the Court granted ARC's request and entered the Amended Complaint.

STANDARD OF REVIEW

In deciding a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), "a court must accept the complaint's factual allegations as true and con-

strue them in the light most favorable to the plaintiff." *Bohan v. Honeywell Int'l, Inc.*, 366 F.3d 606, 608 (8th Cir. 2004). The complaint must be dismissed if plaintiff "cannot prove any set of facts that would entitle [it] to relief." *Id.*

ARGUMENT

I. ARC IS A PRP AND CANNOT AVAIL ITSELF OF ANY OF THE ENUMERATED DEFENSES UNDER CERCLA

Before discussing why ARC cannot maintain an independent cause of action under CERCLA Section 107(a), we must first establish that ARC indeed is a PRP. At a minimum, ARC is liable as a past operator under CERCLA Section 107(a)(2), because at the time of disposal, ARC operated the Camden Site, and particularly Building 52 and the open burning unit. *See* 42 U.S.C. § 9607(a)(2); *see also supra* at 6 (citing Am. Compl. ¶¶ 19-30).[7]

The Supreme Court established the standard for operator liability in *Bestfoods*: "[A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decision about compliance with environmental regulations." 524 U.S. at 66-67. ARC does not and cannot dispute that it meets this test. ARC's Amended Complaint states that ARC was responsible for: (1) removing the hazardous substance (AP-based propellant) from the rocket motors by developing, installing, and using a high pressure water

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[7] By making the argument here that ARC is a past operator, the United States is not waiving any argument that ARC also is liable as an arranger and a transporter. *See* 42 U.S.C. §§ 9607(a)(3), (4).

spray system in Building 52, Am. Compl. ¶¶ 18-20; (2) conducting the operations at the Site that led to propellant-contaminated wastewater and pieces of propellant being disposed into drainage systems, soil and groundwater, and the open burn unit, *id.* ¶¶ 21-25, 28-30; and (3) obtaining a permit from the State of Arkansas to burn contaminated propellant pieces in the open burn unit which resulted in disposal of AP contaminants into the environment, *id.* ¶¶ 26, 28-30. Through these actions, ARC is liable as an operator at the Camden Site under Section 107(a)(2), 42 U.S.C. § 9607(a)(2).

The only way that ARC can escape liability under CERCLA is to establish that it falls under one of the enumerated defenses in Section 107(b), *see supra* at 3-4, or certain other narrowly defined exclusions to liability that are inapplicable in this case. *See supra* n.2. Only if one of these provisions applies can ARC be deemed "innocent" and therefore be able to maintain an independent Section 107 action against another PRP. *Dico*, 340 F.3d at 531 ("an action between an innocent party and another PRP is not between two liable parties"); *see infra* at 12-13. ARC has not alleged a single fact in its Amended Complaint to establish that any of these defenses is applicable. ARC therefore is liable as a PRP and, thus, as discussed below, cannot maintain an independent cause of action under CERCLA Section 107(a) against another PRP.[8]

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[8] The United States is not waiving any of its defenses to liability, including whether the United States is a PRP. For purposes of this motion only, however, the United States will assume its status as a PRP against whom ARC is seeking either full cost recovery or contribution under Section 107(a).

II. AS A PRP, ARC'S INDEPENDENT CLAIM UNDER CERCLA SECTION 107(a) FOR EITHER FULL COST RECOVERY OR IMPLIED CONTRIBUTION IS CONTRARY TO LAW

ARC's Amended Complaint states only that ARC brings this suit under CERCLA section 107(a). Am. Compl. ¶ 1 and Prayer for Relief. The Amended Complaint does not state whether ARC is seeking full cost recovery or contribution under Section 107. Regardless, however, ARC's Amended Complaint should be dismissed because the Eighth Circuit, as well as nine other courts of appeals, have determined that a party who itself is a PRP under CERCLA cannot maintain an independent claim under CERCLA section 107(a); instead, that party is limited to seeking contribution from other liable parties pursuant to CERCLA section 113(f) (which ARC cannot do as discussed *supra* at 7). *See Dico*, 340 F.3d at 530-31 ("[T]here is overwhelming authority among the circuits to support the . . . argument that PRPs are limited to actions for contribution. Accordingly, we hold Dico may not bring an action against the Customer Group for direct recovery unless it can establish it falls within one of the enumerated defenses set out in § 107(b)"); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995) ("Allocation is a contribution claim controlled by 42 U.S.C. § 9613(f)."). [9] The history of the relationship between

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[9] The other relevant courts of appeals cases are: *Bedford Affiliates*, 156 F.3d at 424 ("The language of CERCLA suggests Congress planned that an innocent party be able to sue for full recovery of its costs, *i.e.*, indemnity under § 107(a), while a party that is itself liable may recover only those costs exceeding its *pro rata* share of the entire cleanup expenditure, *i.e.*, contribution under § 113(f)(1)"); *Centerior*

CERCLA Sections 107(a) and 113(f) is helpful to understanding why the Eighth Circuit and other courts of appeals have reached this conclusion.

"CERCLA and SARA together create two different kinds of legal actions by which parties can recoup some or all of the costs associated with clean-ups: section 107 cost recovery actions, . . . and section 113 contribution actions." *Halliburton*, 111 F.3d at 1120; *see Browning-Ferris Indus.*, 33 F.3d at 98; *Colorado & E. R.R.*, 50 F.3d at 1535. The two remedies overlap to some extent because they both allow private parties to recoup costs

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Serv., 153 F.3d at 350 ("Claims by PRPs . . . seeking costs from other PRP's are necessarily actions for contribution, and are therefore governed by the mechanisms set forth in § 113(f)"); *Pneumo Abex*, 142 F.3d at 776 ("[S]ection [113] must be used by parties who are themselves potentially responsible parties"); *Pinal Creek*, 118 F.3d at 1302 ("Under CERCLA's scheme, section 107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties"); *Halliburton*, 111 F.3d at 1120 ("An action brought by a potentially responsible person is by necessity a section 113 action for contribution"); *Redwing Carriers*, 94 F.3d at 1513 ("[W]hen one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a). Rather, it is a claim for contribution under § 113(f)"); *Colorado & E. R.R.*, 50 F.3d at 1536 ("whatever label Farmland may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make . . . controlled by § 113(f)"); *Browning-Ferris Indus.*, 33 F.3d at 103 ("[A]n action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share of the aggregate response costs . . . clearly qualifies as an action for contribution under section 9613(f)(1)"); *Akzo*, 30 F.3d at 764 ("Whatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. Akzo's suit accordingly is governed by section 113(f)").

from other private parties in certain situations. *Aviall*, 125 S. Ct. at 582 n.3. Despite this slight overlap, however, "the two remedies are clearly distinct." *Id.*

"The original CERCLA legislation enacted in 1980 created the cost recovery scheme under § 107(a)." *Bedford Affiliates*, 156 F.3d at 423. Under this scheme, PRPs generally are jointly and severally liable for appropriate response costs, which can result in one PRP bearing a disproportionate share of the response costs. *Dico*, 340 F.3d at 529-530. The original CERCLA statute did not contain any specific mechanism that would allow one PRP to seek contribution from other PRPs to avoid such a disproportionate result. *Id.* at 530. Thus, after CERCLA's passage, litigation arose over whether a PRP who had been sued in a cost recovery action (by the government or by another entity) could obtain contribution from other PRPs to avoid paying a disproportionate share of the response costs. As a result, numerous district courts found that despite the absence of an express contribution provision in CERCLA, the right to contribution either could be implied from the statute or could arise as a matter of federal common law. *See Aviall*, 125 S. Ct. at 581 (citing *United States v. New Castle County*, 642 F. Supp. 1258, 1263-1269 (D. Del. 1986) (contribution right arises under federal common law); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1486-1493 (D. Colo. 1985) (same); *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985) (contribution right is implied from § 107(e)(2))).[10]

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[10] The Supreme Court in *Aviall* noted that these district court decisions were "debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other federal statues." 125 S. Ct. at 581 (citing *Texas Industries, Inc.*

This "judicially-created expansion of § 107(a)(4)(B) served as the sole means by which parties could obtain contribution" until Congress enacted Section 113(f)(1) as part of the 1986 SARA amendments. *Reading*, 115 F.3d at 1119.

The 1986 SARA amendments enacted Section 113(f)(1), which provided for express right of contribution between PRPs. *Dico*, 340 F.3d at 530. Since that time, every court of appeals addressing the issue of contribution between PRPs has concluded that "the express language [in Section 113(f)] providing for a right of contribution implied an intent to limit PRPs to claims for contribution, and to preclude actions between PRPs for direct recovery." *Dico*, 340 F.3d at 530 (citing *N.J. Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 104 (3d Cir. 1999); *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 415 (4th Cir. 1999); *Bedford Affiliates*, 156 F.3d at 424; *Centerior Serv.*, 153 F.3d at 350; *Pinal Creek*, 118 F.3d at 1306; *Redwing Carriers*, 94 F.3d at 1496; *Colorado & E. R.R.*, 50 F.3d at 1536; *Browning-Ferris*, 33 F.3d at 101; *Akzo*, 30 F.3d at 764; *Amoco Oil*, 889 F.2d at 672). "Thus, the language of § 113(f), permitting contribution, *replaced* the judicially created right to contribution under § 107(a)(4)(B)," *Reading*, 115 F.3d at 1119 (emphasis added), and became "the *sole* means for seeking contribution." *Id.* at 1120 (emphasis added); *see Halliburton*, 111 F.3d at 1120-22.

The Eighth Circuit in *Dico* specifically addressed the issue of actions between PRPs and unequivocally rejected the argument that CERCLA allows direct cost

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v. Radcliff Materials, Inc., 451 U.S. 630, 638-647 (1981); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 90-99 (1981)).

recovery actions between PRPs under Section 107. The Eighth Circuit stated that CERCLA Section 107 "allows the government or an '*innocent*' private party to recover cleanup costs from PRPs through a direct cost recovery action." 340 F.3d at 529 (emphasis added) (citing 42 U.S.C. § 9607(a)). The court then went on to explain that since the 1986 SARA amendments, the "overwhelming authority among the circuits" has held that "PRPs are limited to actions for contribution." *Id.* at 531; *see id.* at 530 (citing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits). The Eight Circuit agreed with this "overwhelming authority" and held that a PRP "may not bring an action against [another PRP] for direct recovery unless it can establish it falls within one of the enumerated defenses set out in § 107(b)." *Id.* at 531. Accordingly, the law in this Circuit is that a PRP—like ARC—cannot rely solely on Section 107(a) to recoup its response costs and instead is limited to bringing a contribution action under Section 113(f), unless the PRP can establish that it is not liable because it can avail itself of one of the enumerated defenses in Section 107(b).

The uniformity among the courts of appeals on this issue is not surprising. These decisions rest on the principle recognized in a variety of judicial and statutory contexts that jointly responsible parties may obtain an equitable allocation of their common liability through the mechanism of a contribution claim. *See e.g.*, *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 87-88 (1981). In addition, these decisions give CERCLA the full effect that Congress intended. CERCLA's language strongly suggests that "Congress planned that an innocent party be able to sue for full recovery of its costs, *i.e.*, indemnity under § 107(a), while a party that

is itself liable may recover only those costs exceeding its *pro rata* share of the entire cleanup expenditure, *i.e.*, contribution under § 113(f)(1)." *Bedford Affiliates*, 156 F.3d at 424. Thus, to the extent that ARC seeks full cost recovery against the United States under a theory of joint and several liability under Section 107(a), such a claim has been uniformly rejected by ten courts of appeals, including the Eighth Circuit, and also should be rejected here.

Not only is ARC barred from asserting any claim for full cost recovery under Section 107(a) in this case, but it also is barred from asserting an implied contribution claim under that Section. *Every* courts of appeals addressing the issue has found that the only mechanisms under CERCLA for pursuing a contribution claim are provided in Section 113(f). *See supra* at 10, n.9. "CERCLA and SARA together create two different kinds of legal actions by which parties can recoup some or all of the costs associated with clean-ups: section 107 cost recovery actions, [] and section 113 contribution actions." *Halliburton*, 111 F.3d at 1120 (internal citations omitted); *Browning-Ferris*, 33 F.3d at 99-101 (same). Accordingly, a claim for contribution cannot be asserted *independently* under CERCLA Section 107(a)(4)(B); there must be a claim asserted under CERCLA Section 113(f)(1) or (f)(3)(B). *See Pinal Creek*, 118 F.3d at 1306 (a PRP's claim for contribution "*requires* the application of § 113 [because] a PRP is limited to a contribution claim governed by the joint operation of §§ 107 and 113") (emphasis added).

Further, although the Supreme Court in *Aviall* did not reach the issue of an implied right of contribution under Section 107, the Court specifically noted that

"[t]o the extent that Aviall chooses to frame its § 107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery), . . . we note that this Court has visited the subject of implied rights of contribution before." 125 S. Ct. at 586 (citing *Texas Indus.*, 451 U.S. at 638-647; *Northwest Airlines*, 451 U.S. at 90-99). In both of the cases that the Supreme Court cited—*Texas Indus.* and *Northwest Airlines*—the Supreme Court determined that the statutes in question did not create an express right to contribution. *Texas Indus.*, 451 U.S. at 640; *Northwest Airlines*, 451 U.S. at 90-91. Therefore if any right to contribution existed under either statute, it had to exist through federal common law. *Texas Indus.*, 451 U.S. at 639; *Northwest Airlines*, 451 U.S. at 90-91. In both cases, however, the Supreme Court declined to find that federal common law had created an implied right of contribution under the statutes in question. *Texas Indus.*, 451 U.S. at 646 ("We are satisfied that neither the Sherman Act nor the Clayton Act confers on federal courts the broad power to formulate the right to contribution here."); *Northwest Airlines*, 451 U.S. at 91, 94-95 ("[W]e have been unable to discover any manifestation of an intent on the part of Congress to create a right to contribution in favor of employers under the Equal Pay Act and Title VII. Accordingly we hold that there is no implied right to contribution under those statutes").

Aside from the Supreme Court's admonition in *Aviall* regarding an implied right of contribution under Section 107, the Supreme Court's principles of statutory construction also compel the conclusion that CERCLA Section 107(a)(4)(B) cannot serve as an independent basis for a contribution claim. "It is an elemental canon of statutory construction that where a statute expressly

provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979); *accord Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 488 (1996). "[O]nce Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Therefore, the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines*, 451 U.S. at 95 n.34. The Supreme Court has "explained [that] where Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute, as Congress has done with . . . CERCLA, 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under' the statute." *Meghrig*, 516 U.S. at 487-488 (citing *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981)). Thus, because Congress expressly authorized private citizens to bring contribution actions when it enacted section 113(f), it would be inappropriate to read an independent right of action of contribution into section 107(a)(4)(B). Accordingly, ARC's attempt in its Amended Complaint to plead a cause of action under CERCLA Section 107(a) for contribution—without reference to the express causes of action provided in Section 113(f)—is futile.

Because ARC is a liable as a PRP and cannot avail itself of any of the enumerated defenses or exclusions under Section 107(b), ARC's attempt to invoke Section 107(a) as the sole basis for recouping all or some of its alleged response costs is directly contrary to Eighth Circuit precedent. The Court therefore should dismiss ARC's Amended Complaint.

CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court grant the Motion to Dismiss for Failure to State a Claim on the grounds that CERCLA section 107(a), 42 U.S.C. § 9607(a), does not provide ARC with an independent cause of action in this case.

Respectfully submitted,
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DATED: January 24, 2005

CERTIFICATE OF SERVICE

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

Case No. 02-CV-1199

ATLANTIC RESEARCH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Mar. 8, 2005]

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendant, the United States of America, moved to dismiss the amended complaint of Plaintiff, Atlantic Research Corporation ("ARC"), that asserts a stand-alone claim under Section 107(a) of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), to recover cleanup costs ARC allegedly incurred at a hazardous waste site. Section 107(a) does not provide a potentially responsible party ("PRP") like ARC with a right to sue another liable party to recover either all or some of those cleanup costs. Eighth Circuit precedent, as well as nine other courts of appeals, dictates that such suits are by their very nature suits in contribution that can be brought *only* pursuant to CERCLA Section 113(f), 42 U.S.C. § 9613(f). ARC's arguments to the contrary reflect fun-

damental misunderstandings of this body of caselaw, as well as a significant misreading of the Supreme Court's decision in *Cooper Indus., Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004) ("*Aviall*"). The Court therefore should grant the United States' motion.

I. *AVIALL* DOES NOT OVERRULE OR CAST DOUBT ON EIGHTH CIRCUIT AND OTHER APPELLATE CASELAW THAT A LIABLE PRIVATE PARTY CANNOT SUE SOLELY UNDER SECTION 107(a)

District courts in the Eighth Circuit, as well as the Eighth Circuit itself, are bound "to apply the precedent of this Circuit." *Hood v. United States*, 342 F.3d 861, 864 (8th Cir. 2003) (citation omitted). Eighth Circuit decisions remain good law "[u]ntil modified or overruled by the court en banc." *Gipson v. KAS Snacktime Co.*, 171 F.3d 574, 576 n.3 (8th Cir. 1999).

The Eighth Circuit's decision in *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003), governs this case. In *Dico*, the court held that an action by a private PRP against another PRP is necessarily one for contribution that is governed by the express right of contribution in CERCLA Section 113(f). *Id.* at 530-531. Because that precedent has been neither overruled nor cast into doubt by *Aviall* or by an en banc panel of the Eighth Circuit, this Court is bound by it.

ARC is incorrect that the Supreme Court's holding and underlying rationale in *Aviall* creates a new legal landscape under which "volunteer PRPs" can bring a stand-alone claim under Section 107(a).[1] Plaintiff's

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[1] ARC repeatedly makes a distinction between private PRPs who voluntarily conduct a CERCLA cleanup and PRPs who are compelled by the government to do so. Plf's Opp. at 2, 15-16. For purposes of

Memorandum in Opposition to Defendant's Motion to Dismiss for Failure to State a Claim, filed February 17, 2005 ("Plf's Opp.") at 2. The sole issue and holding in *Aviall* was "whether a private party who has not been sued under [CERCLA] § 106 or § 107(a) may nevertheless obtain contribution under § 113(f)(1) from other liable parties. We hold that it may not." 125 S. Ct. at 580. Nothing in *Aviall* overrules, let alone calls into question, the rule in the Eighth Circuit or nine other circuits that the sole mechanism for private PRPs to recover alleged response costs they have incurred is provided in Section 113(f).

The Supreme Court explicitly refused to address whether a private PRP (like ARC) has an independent right under Section 107(a) to seek cost recovery—either in whole or in part through contribution—from other PRPs. *Aviall*, 125 S. Ct. at 585 ("withhold[ing] judgment" on whether a liable party may seek cost recovery under Section 107); *id.* at 586 ("we decline to decide whether Aviall has an implied right to contribution under § 107"). Given this express refusal, one district court has already determined that *Aviall* did not overrule the Second Circuit's ruling in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), which held that a private PRP is limited to seeking *contribution* from other liable parties under Section 113(f). In *Elementis Chems., Inc. v. TH Agriculture & Nutrition, L.L.C.*, No. 03 Civ. 5150 (LBS), 2005 WL 236488 (S.D.N.Y. Jan. 31,

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distinguishing a claim under Section 107(a)(4)(B) from one under Section 113(f), the relevant distinction is not between volunteers or non-volunteers; rather, it is between liable or non-liable parties. *See, e.g., Dico*, 340 F.3d at 529-530 (distinguishing Section 107(a) claims which are for the government or an "innocent" private party from Section 113(f) claims which are claims by one PRP against another).

2005), the district court concluded that "[i]t would be inappropriate . . . to contradict the Supreme Court and declare that the Supreme Court had effectively done something which it specifically said it had not done—namely, overrule[] *Bedford Affiliates*." *Id.* at *10.

In addition, *Aviall* does not cast any doubt on the well-established principles underlying *Dico* and the other courts of appeals decisions.[2] ARC urges that *Aviall* "fundamentally altered the assumptions underlying the referenced decisions of the ten courts of appeals . . . ." Plf's Opp. at 16. The critical flaw in ARC's argument, however, is that it rests on the assumption that the courts of appeals disallowed actions by private PRPs under Section 107(a) *only* because they assumed that *all* private PRPs, volunteer or not, could use 113(f) to seek contribution. *Id.* at 2, 16-17, 20-21. But this same argument was rejected by the court in *Elementis*. *See* 2005 WL 236488, at *10 (rejecting plaintiff's argument that "'the essential underlying premise[]'" of *Bedford Affiliates* was "'that all PRPs, including those who had not been subject to a prior 106 or 107(a) action . . . can proceed with a contribution action under section 113(f)'"). Although *Aviall* may have changed a "volunteer" PRP's ability to seek contribution under Section 113(f)(1), it did nothing to change the fundamental assumption that underlies the courts of appeals cases: that claims by private PRPs, *i.e.*, liable parties, are *necessarily* actions for contribution, which *must* be brought using the ex-

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[2] *See* Defendant's Memorandum in Support of Motion to Dismiss for Failure to State a Claim, filed January 26, 2005 ("Def's Mem.") at 4 n.5 (citing cases that have restricted private PRPs to actions for contribution under Section 113(f)).

press limited mechanisms that Congress provided in Section 113(f).[3]

Although courts of appeals decisions have rightly considered the interplay between Sections 107(a) and 113(f), they did so by looking to the "venerable common-law backdrop," *United States v. Bestfoods*, 524 U.S. 51, 62 (1998), against which Congress enacted Section 113(f). Congress' language in Section 113(f) reflects the general understanding, firmly rooted at the time of the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, that "[t]he term 'contribution' is a standard legal term that refers to a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make." *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997) ("*Halliburton*") (quoting *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 99 (1st Cir. 1994)); *see Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350-351 (6th Cir. 1998) (looking to traditional concept of contribution); *United States v. Colorado & Eastern R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (citing Restatement (Second) of Torts § 886A (1979)). The two express avenues for contribution that Congress provided in Sections 113(f)(1) and (f)(3)(B) are consistent with that traditional understanding of contribution. Against that common law backdrop, the courts of appeals concluded that suits by private PRPs under

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[3] Section 113(f)(1) is not CERCLA's only avenue of recourse for a private PRP. Section 113(f)(3)(B) allows a PRP who has entered a settlement to sue for contribution. 42 U.S.C. § 9613(f)(3)(B). A private PRP also may have a right under appropriate circumstances to seek recovery from other PRPs under state law.

CERCLA are "quintessential claim[s] for contribution," *Bedford Affiliates*, 156 F.3d at 424 (citing other circuit court decisions and Restatement (Second) of Torts § 886A (1979)), and therefore that such parties are restricted to pursuing one of the express avenues for contribution in Section 113(f). *See* Def's Mem. at 4 n.5 (citing cases); *id.* at 9-10 & n.9 (citing cases).[4]

For example, in *United Techs.*, 33 F.3d 96 (1st Cir. 1994), the issue before the First Circuit was whether the action was one for cost recovery or for contribution, which was determinative of which statute of limitations applied. *Id.* at 98. The court focused on the "stable, well-known denotation" of the legal term "contribution." *Id.* at 99.

> Adapted to an environmental case, [contribution] refers to an action by a *responsible* party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share of the aggregate response costs (including both first-instance costs and reimbursed costs).

Id. at 103 (emphasis added). Because the claimants were indeed liable, "their claim[s] [against another PRP] must be classified as an action for contribution." *Id.* at 101. Nothing in *Aviall* either expressly or implicitly altered this fundamental understanding.

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[4] Because this traditional understanding of contribution was the basis for the appellate decisions, including *Dico*, the fact that *Dico* involved a PRP who was issued an administrative order under CERCLA section 106 is of no consequence, despite ARC's musings to the contrary. *See* Plf's Opp. at 18-20. The private PRP in *Dico* was limited to an action for contribution because it was *liable*, not because it had been received an administrative order. 340 F.3d at 530-531.

II. SECTION 107(a)(4)(B) DOES NOT EXPRESSLY OR IMPLIEDLY PROVIDE AN INDEPENDENT CAUSE OF ACTION FOR A PRIVATE PRP WHO DOES NOT SATISFY THE CONDITIONS IN SECTION 113(f)

Although *Aviall* has not changed the legal landscape that precludes a private PRP (volunteer or otherwise) from using Section 107(a) to assert a stand-alone claim against another PRP, ARC urges the Court to find that Section 107(a)(4)(B) *expressly* authorizes such a claim. Plf's Opp. at 9-14. This argument flies in the face of the appellate courts decisions and is unsupported by the text and structure of CERCLA.

The Eighth Circuit in *Dico* found that Section 107 "allows the government or an '*innocent*' private party to recover cleanup costs from PRPs through a *direct* cost recovery action." 340 F.3d at 529 (emphasis added).[5] Under a Section 107 action, "PRPs are held jointly and severally liable for the costs of cleanup." *Id.* at 529-530.[6] As a result, one PRP "may bear a disproportionate share of the cleanup costs." *Id.* at 530. In light of that possible inequity, some pre-SARA courts *implied* a right to contribution under Section 107. *Id.* (citations omitted).[7] But in 1986, Congress codified an *express*

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[5] *See also Halliburton*, 111 F.3d at 1120 ("a section 107 action brought for recovery of costs may be brought only by *innocent* parties that have undertaken clean-ups") (emphasis in original).

[6] *See Halliburton*, 111 F.3d at 1121 (a section 107 action imposes joint and several liability).

[7] The Supreme Court majority observed that these pre-SARA holdings were "debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other federal statutes." 125 S. Ct. at 581 (citations omitted); *id.* at 586 (the Supreme Court "visited the subject of implied rights of contribu-

mechanism for seeking contribution through the two avenues in Sections 113(f)(1) and (f)(3)(B). After that, courts consistently "held the express language" of Section 113(f) "limit[s] PRP's to claims for contribution, and . . . preclude[s] actions between PRPs for *direct* recovery." *Id.* at 530 (citations omitted) (emphasis added). Based on this understanding, the Eighth Circuit in *Dico* specifically rejected the argument that "the *direct* recovery action found in § 107 is available . . . equally" to non-liable private parties and liable private parties (PRPs). *Id.* at 530-531. Thus, in the Eighth Circuit, private PRPs—like ARC—may *not* bring an independent action against other PRPs for recovery under Section 107(a). *Id.* at 531. This result is consistent with the traditional contribution concepts discussed *supra* at 3-4.

Contrary to this precedent, ARC argues that Section 107(a)(4)(B) provides an express right to contribution independent of Section 113 and regardless of whether a PRP meets the prerequisites of Section 113(f). Plf's Opp. at 10-15. Relying on language in Section 107(a)(4)(B) that provides, in relevant part, that the four categories of PRPs "shall be liable" for "any other necessary costs of response incurred by *any other person* consistent with the national contingency plan," 42 U.S.C. § 9607(a)(4)(B) (emphasis added), ARC claims that this language creates a catchall that allows *any* private person, regardless of its liability and regardless of whether it meets the prerequisites of Section 113(f) (like a "vol-

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tion before") (citations omitted); *see also United Tech.*, 33 F.3d at 100 (noting that the pre-SARA courts' recognition of an implied right of contribution under Section 107(a) "was clouded by the [Supreme] Court's refusal to imply rights of action under other statutes in the absence of an express direction from Congress") (citations omitted).

unteer" PRP) to seek contribution from another PRP. Several courts have rejected such an argument.

For example, the First Circuit in *United Techs.* rejected an argument that this language "provides an alternative avenue for maintenance of [a private PRP's] suit." 33 F.3d at 101. "At face value, this expansive reading of section 9607 is untenable[,]" and the First Circuit "refuse[d] to follow a course that ineluctably produces judicial nullification of an entire SARA subsection" in Section 113. *Id.* (citation omitted). Similarly, ARC's interpretation, would render Sections 113(f)(1) and (f)(3)(B) superfluous, ignoring Congress' intent that these two Sections preempt any implied right to contribution under Section 107(a) and provide *the* express limited mechanisms under which a PRP can seek contribution under CERCLA. *See In the Matter of Reading*, 115 F.3d 1111, 1119 (3d Cir. 1997) ("Congress intended to replace 107(a)(4)(B)'s implied contribution remedy when it enacted § 113(f)"). The Supreme Court has cautioned against such a result. *See Hohn v. United States*, 524 U.S. 236, 249 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous"). Other courts also have rejected arguments that the "any other person" language is broad enough to allow a PRP to bring a contribution action against other PRPs.[8]

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[8] *See Bedford Affiliates*, 156 F.3d at 424 (noting that Section 107(a) holds a PRP liable for costs incurred by "any other person," but concluding that an action by one PRP against another PRP is a "quintessential claim for contribution" that is governed by Section 113(f)); *Centerior Serv.*, 153 F.3d at 349-350 (rejecting argument that the "any other person" language does not limit Section 107(a) to "innocent" parties); *Halliburton*, 111 F.3d at 1122 (despite the "any . . . person" language, Section 107(a) "was designed to enable *innocent* persons who

In addition, ARC's expansive reading of Section 107(a) does not comport with CERCLA's plain language and structure. Congressional enactments should be construed in light of "the cardinal rule that a statute is to be read as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The plain language of Sections 107(a) and 113(f) mesh with CERCLA's liability scheme and create a coherent mechanism for apportioning cleanup costs among jointly liable parties. Although Section 107(a)(4)(B) establishes the liability for "necessary costs of response" incurred by parties that cannot sue under Section 107(a)(4)(A), it "does not specify whether these costs will arise from joint and several liability or sound in contribution." *Centerior Serv.*, 153 F.3d at 350. Section 113(f) therefore provides the express mechanism for contribution. "In short, after SARA, CERCLA provided for a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances, §§ 113(f)(1), 113(f)(3)(B)." *Aviall*, 125 S. Ct. at 582. Since that time, Sections 107 and 113 have been read to work "[t]ogether . . . [to] provide and regulate a PRP's right to claim contribution from other PRPs." *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997). Parties seeking contribution under Section 113(f) look to Section 107 for the "basis and elements of the liability of the defendants" and, thus, the Section 113(f) action "*is* an action to recover the necessary costs of response by any other person, as referred to in § 107. The action only happens to be one for contribution." *Centerior*, 153 F.3d at 350 (em-

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incur expenses cleaning up a site to recover their costs from [PRPs]") (emphasis added).

phasis added) (agreeing with the government's argument to this effect).[9]

Contrary to ARC's view, Plf's Opp. at 26-31, this reading is the only result that avoids private PRPs making an end run around the statute of limitations in Section 113(g), 42 U.S.C. § 9613(g), or nullifying any part of that Section.[10] This also avoids the anomaly of one jointly liable private party suing another jointly liable party for the full costs of a CERCLA cleanup under Section 107(a). Finally, this ensures that parties who have settled with the government and received protection from "claims for contribution regarding matters addressed in the settlement," 42 U.S.C. § 9613(f)(2), are not subject to double liability through a Section 107(a) suit by a non-settling party on the theory that such a suit imposes an independent basis of liability apart from contribution.

Despite the plain language of CERCLA, ARC makes numerous other arguments in support of its expansive reading of Section 107(a), all of which are unpersuasive.[11] First, ARC's reliance on dicta in *Key Tronic*

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[9] *See also Centerior Serv.*, 153 F.3d at 353 ("any person may seek to recover costs under § 107(a), but . . . it is the nature of the action which determines whether the action will be governed exclusively by § 107(a) or by § 113(f) as well") (citations omitted); *Pinal Creek*, 118 F.3d at 1302 ("The contours and mechanics of this right [to contribution] are now governed by § 113").

[10] *See, e.g., Matter of Reading Co.*, 115 F.3d at 1119; *United Techs.*, 33 F.3d at 101; *Bedford Affiliates*, 156 F.3d at 424; *Pinal Creek*, 118 F.3d at 1304.

[11] One of ARC's remaining arguments concerns the statute of limitations in Section 113(g), 42 U.S.C. § 9613(g). Plf's Opp. at 24-26. ARC's argument that the CERCLA statute of limitations provisions "do not . . . conflict" with ARC's assertion of a stand-alone Section

Corp. v. United States, 511 U.S. 809 (1994), is misplaced. Plf's Opp. at 28; *see also* Plf's Opp. at 12-13 (citing *Key Tronic*, 511 U.S. at 816). The issue of the relationship between §§ 107 and 113 was *not* before the Supreme Court in that case. *Aviall*, 125 S. Ct. at 585 (*Key Tronic* "did not address the relevance, if any, of Key Tronic's status as a PRP or confront the relationship between §§ 107 and 113"); *see also Dico*, 340 F.3d at 531 (rejecting Dico's argument on the relevance of *Key Tronic* on the relationship between Sections 107 and 113). Thus, contrary to ARC's assertion, *Key Tronic* does not "underscore" that a "volunteer" PRP can pursue a contribution claim under Section 107. Plf's Opp. at 28.[12]

Second, ARC cannot rely on the "savings" clause in the last sentence of Section 113(f). Plf's Opp. at 14 (citing *Aviall*, 125 S. Ct. at 584). Through Section 113(f), Congress expressly delineated the circumstances under which contribution would thereafter be available under CERCLA. Congress did *not* codify some broader version of contribution that would have allowed liable private parties to seek contribution under *either* Section 113(f) or Section 107(a). "The sole function of the [savings clause] is to clarify that § 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of § 113(f)(1)." *Aviall*, 125 S. Ct. at 583-584. In other words, the specific terms of the savings provision merely preserve whatever independ-

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107(a) claim is simply beside the point. *Id.* at 26. As ARC points out, interpretation of the statute of limitations provisions should not drive the Court's interpretation of CERCLA's substantive provisions. *Id.* at 26 (citing *Pinal Creek*, 113 F.3d at 1305).

[12] In other *Key Tronic* dicta, the Supreme Court rejected an attempt to find an express right to sue under Section 107. *See* 511 U.S. at 818 n.11.

ent rights to contribution exist outside of § 113(f)(1), such as under state law or under Section 113(f)(3)(B). *See supra* n.3; *see, e.g., United States v. Locke*, 529 U.S. 89, 105 (2000); *see also Atherton v. FDIC*, 519 U.S. 213, 227-228 (1997). The savings clause does not *create* a backup for any private PRP who does not meet the prerequisites of Sections 113(f) to bring a stand-alone claim for contribution under Section 107(a) that post-SARA courts have uniformly found does not exist.[13] "There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contributions actions absent those conditions." *Aviall*, 125 S. Ct. at 583. The *Aviall* Court went on to state that "the savings clause[] does not change our conclusion." *Id.*

Third, although courts do not consult legislative history where the language of the statute is clear, *see, e.g., Lamie v. United States Trustees*, 520 U.S. 526, 539-540 (2004), the legislative history here does not support ARC's position. Plf's Opp. at 22-23. Both the Senate and House bills confirm that Congress intended to restrict contribution actions to those situations where there has been a Section 106 or 107(a) civil action or an administrative or judicially approved settlement, which is consistent with the traditional common law understanding of contribution and the mechanisms provided in Section 113(f). *See* S. Rep. No. 99-11, at 103 (1985) (proposed Section 107(*l*)(2)); H.R. Rep. No. 99-253, Pt. 1, at 13 (1985) (proposed Section 113(g)(1)).

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[13] *See Elementis*, 2005 WL 236488, at *10 (rejecting plaintiff's argument that *Aviall*'s statement regarding the savings clause renders "inappropriate" the line of cases like *Bedford Affiliates*).

Fourth, there is no merit to ARC's speculation that the enforcement choices of the United States Environmental Protection Agency ("EPA") could substantially favor some PRPs over others. Plf's Opp. at 24. Generally, when EPA issues a unilateral administrative order under Section 106 of CERCLA, the agency first offers the recipient an opportunity to enter an administrative order on consent, which would give rise to a contribution claim under Section 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B).

Fifth, ARC's proffered policy and equity considerations cannot overcome the plain terms of Sections 107(a) and 113(f). Plf's Opp. at 22-24. In the future, Congress may decide to make a legislative judgment that a PRP who undertakes a cleanup in the absence of the prerequisites in Section 113(f) should nonetheless be able to recover costs from other PRPs. But it would be improper here for the Court to arrogate to itself the authority to override the statutory text on the basis of its own assessment of policy considerations. Indeed, the court in *Elementis* recognized that equally important policy considerations warrant limiting private PRPs to contribution claims under Section 113(f). A private PRP that cannot avail itself of the express right to contribution under 113(f)(1) still has "one remaining route to CERCLA relief" under Section 113(f)(3)(B) by entering into an administrative or judicially approved settlement. 2005 WL 236488, at *13. "To aid the expeditious resolution of environmental claims . . . Congress employed incentives for responsible parties to settle and strong disincentives for non-settling potentially responsible parties." *Id.* (citation and internal quotation marks omitted).

Finally, ARC recently submitted a letter to the Court suggesting that oral argument is necessary, in part, to address the "inconsistent position" that the United States is taking in a CERCLA enforcement action in the Eastern District of Tennessee.[14] There is no inconsistency, however. CERCLA provides the United States, as sovereign, with authority and a cause of action not available to private PRPs. *See* 42 U.S.C. §§ 104, 106, 107(a)(4)(A). Numerous courts have recognized that the United States, unlike a private PRP, is not limited to a claim in contribution, even where the United States is itself a PRP.[15]

CONCLUSION

For the reasons stated above and in the Defendant's Memorandum in Support of Motion to Dismiss for Failure to State a Claim, the United States respectfully request that the Court dismiss ARC's amended complaint.

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[14] *See* Letter from Robert A. Matthews to the Honorable Harry F. Barnes, dated February 25, 2005.

[15] *See, e.g., See, e.g., United States v. Chrysler Corp.*, 157 F. Supp.2d 849 (N.D. Ohio 2001) (National Park Service, owner of contaminated land, could sue under Section 107(a), and obtain joint and several liability, despite its own potential liability); *United States v. Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991) ("The Government's potential liability for contribution does not affect this section 107(a) response costs recovery action."); *United States v. Monsanto Co.*, 858 F.2d 160, 164 & n.2, 173 & n.28 (4th Cir. 1988) (upholding decision to allow the United States to bring a Section 107 joint and several action when largest PRPs were United States agencies).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 8, 2005, the foregoing Defendant's Reply Memorandum in Support of Motion to Dismiss for Failure to State a Claim was served by overnight delivery on the following counsel of record:

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3152

ATLANTIC RESEARCH CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court
For The Western District Of Arkansas,
El Dorado Division

The Honorable Harry F. Barnes

[Filed: Oct. 12, 2005]

BRIEF OF APPELLANT
ATLANTIC RESEARCH CORPORATION

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STATEMENT OF THE ISSUES

Whether, Pursuant To CERCLA Section 107(a)(4)(B), or Under Federal Common Law, A Potentially Responsible Party ("PRP") Who Is Liable Under CERCLA Has A Cause Of Action Under CERCLA To Recover An

Equitable Share Of Response Costs From Another PPR, Even In The Absence Of A Prior Or Pending Section 106 Or 107 Civil Action Or A Section 113(f)(3)(B) Settlement.

The District Court held that in *Dico Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003), this Court "appeared" to have resolved this issue, "holding that . . . a party that is subject to CERCLA liability is limited to seeking contribution from other jointly liable parties [other PRPs] in accordance with Section 113(f) . . ." (A-Ap. 4).[1] Because the United States Supreme Court recently held that Section 113(f) does not authorize a PRP to sue another PRP for contribution absent having been sued under Sections 106 or 107(a) of CERCLA, or absent having resolved its liability through an administrative or judicially approved settlement, see *Cooper Industries Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004), the District Court felt that it had no alternative but to dismiss ARC's contribution action despite the fact that the result was "patently unfair" to ARC. The District Court expressed hope that this Court would "give attention" to this unfairness if it chooses to "revisit the holding of *Dico*." (A-Ap. 6).

ARC respectfully submits that *Dico* does not compel dismissal of its Amended Complaint, and that both Section 107(a)(4)(B) and federal common law permit ARC to recover an equitable share of its response costs from another PRP which, in this case, is the United States.

Apposite cases: *Aviall, supra*; *Dico, supra*; *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930 (8th Cir. 1995); *Consolidated Edison Co. of N.Y. v. UGI Utilities*, ___

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[1] Reference to A-Ap. is to ARC's Appendix.

F.3d ___, 04-2409-CV (2d Cir., Sept. 9, 2005), 2005 WL 2173585.

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